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MAR 16 1994

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

BY HAND DELIVERY

Mr. William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Re: Broadband PCS Pioneer's Preferences, Gen. Docket No. 90-314,
February 25, 1994 Invitation of Pioneer's Preference Applications

Dear Mr. Caton:

Bell Atlantic Personal Communications, Inc. ("Bell Atlantic"), on behalf of the Bell Atlantic Companies, has been an active participant in virtually every aspect of the Commission's proceeding to establish new personal communications services ("PCS"), including the Commission's consideration of pioneer's preference requests for broadband PCS. This letter constitutes Bell Atlantic's formal objection to the Commission's recent invitation to broadband PCS pioneer's preference winners to file PCS license applications.

As set forth in more detail below, pursuant to Section 1.41 of the Commission's rules, Bell Atlantic respectfully requests the Commission to rescind the public notice inviting broadband PCS applications, return any such applications it has thus far received, and take no further action to accept or process any PCS application until such time as the PCS service rules and application processing procedures have been clarified and finalized.

On February 3, 1994, the Commission released its Third Report and Order in Gen. Docket No. 90-314, finalizing the grant of three pioneer's preferences for broadband PCS to American Personal Communications ("APC"), Omnipoint Communications, Inc. ("Omnipoint") and Cox Enterprises, Inc. ("Cox"). The Third Report and Order also affirmed the denial of many other broadband PCS pioneer's preference requests, including Bell Atlantic's. On February 25, 1994, two days before public notice of the Third Report

Mr. William F. Caton
March 16, 1994
Page 2

and Order appeared in the Federal Register, the Commission issued a notice inviting APC, Omnipoint and Cox to file PCS applications with the Commission.^{1/}

The Commission's action in inviting PCS applications from the broadband pioneer's preference winners was illegal, premature and heightens the procedural confusion and inconsistency that have plagued the process of awarding pioneer's preferences for broadband PCS licenses.^{2/} Although the Commission's invitation is objectionable standing alone, it is especially troubling because it may portend a "rush to judgment" approach to accepting and granting the preference winners' license applications that is neither appropriate nor sustainable in view of the legal and regulatory flux that surrounds the PCS licensing, auction and application processing rules.^{3/} The Commission seems to be rushing to process the applications of the pioneer's preference winners without stopping to resolve many issues that go to the heart of the PCS licensing structure. If such is the case, then the Commission will violate basic principles of administrative law, which at a minimum require service rules to be in effect before action on specific applications is taken.

^{1/} Commission Invites Filing of Broadband Personal Communications Service Pioneer's Preference Application, Public Notice (Feb. 25, 1994).

^{2/} The Commission's invitation also incorrectly assumed that the so-called "pioneers" are eligible to file PCS license applications. The pioneer's preference, however, although quasi-adjudicatory in nature, has been construed and defended by the FCC as "a valid exercise of [the FCC's] rulemaking authority." Memorandum Opinion and Order, 8 FCC Rcd at 1659 (emphasis supplied); see also Adams Telcom, 997 F.2d 955, 957 (D.C. Cir. 1993). A rulemaking is not effective under the Commission's rules until 30 days after Federal Register publication. 47 C.F.R. § 1.427(a). Because publication in this case did not occur until February 28, 1994, the rule does not become effective until March 30, 1994. Thus, the factual premise underlying the notice was both incorrect and improper. As of now, APC, Omnipoint and Cox possess no effective pioneer's preference and thus are not even eligible to submit applications to the FCC.

^{3/} The pioneer's preference concept and the merits of the pioneer's preference awards themselves are also subject to reconsideration and review before the Commission and in the courts. Moreover, the Commission's invitation stands in stark contrast to its action in narrowband PCS. There, the Commission deferred inviting any applications until it had completed reconsideration of the service rules for narrowband PCS. See Commission Invites Filing of Narrowband Personal Communications Service Pioneer's Preference Application, Public Notice (Feb. 3, 1994)

Mr. William F. Caton

March 16, 1994

Page 3

Thus, the Commission should not have invited and in any event must not accept for filing any PCS application at this time. Before accepting any broadband PCS application, the Commission must rule on the pending Petitions for Reconsideration in Gen. Docket No. 90-314. Many of these petitions, if granted, will have a direct effect on the size, scope and technical nature of the preference grants. To act now would be to risk further administrative confusion and general delay in the rollout of PCS to the public, particularly if the current pioneer's preferences change significantly in nature or scope, or are ultimately awarded to different parties.

1. The Commission Must Not Accept PCS Applications Because the Rules Necessary to Process or Evaluate Them Are Not in Place

To the extent that the Commission's invitation to APC, Cox and Omnipoint is the acknowledged first step in accepting the applications of these parties for filing and ultimately granting them, it is ill-advised from a legal and public policy perspective. The Commission's public notice acknowledges that its rules for broadband PCS are not in place, and in fact the entire regulatory framework for PCS is in flux. The Commission nonetheless seeks to avoid this problem by using its Part 22 rules as a proxy for PCS processing rules that have not yet been promulgated. This approach, however, makes little sense from the standpoint of reducing the Commission's administrative processing burden. More important, it violates the Commission's obligation to adopt rules through rulemaking procedures rather than proceeding by public notice.

First, the Commission cannot and should not accept or process any PCS applications because there are no processing rules in effect to consider them. In its proceeding to implement Section 309(j) of the Communications Act, the Commission has proposed rules to govern the processing of PCS applications. See In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding, Notice of Proposed Rule Making, PP Docket No. 93-253, 8 FCC Rcd 7654 (1993) ("Auction Notice"). This proposal includes regulations that govern the filing, initial review and processing of PCS applications, as well as objections to such applications. See id. at 7656, ¶ 128. These rules and standards will govern all PCS applications, including those submitted by parties who have received a pioneer's preference. To date, however, no specific processing rules or standards have been adopted either for broadband or narrowband PCS applications.^{4/} In this

^{4/} There are, for example, no rules in effect to determine the application forms and exhibits to be filed; the bureau that will act on particular applications; the procedures for public notice; the permissibility of amendments; or the procedures for filing petitions to deny. On March 8, 1994, the FCC did adopt a generic "menu" of rules to implement its new authority to use

Mr. William F. Caton

March 16, 1994

Page 4

vacuum, inviting and in all events accepting or granting any PCS application is illogical and arbitrary.

The service rules for PCS are also unresolved. Virtually every critical aspect of the PCS rules has been challenged in almost seventy petitions for reconsideration.^{5/} The modification of the PCS service rules on reconsideration could alter fundamentally the size and scope of the preference awards to APC, Cox and Omnipoint, and correspondingly, the premises of their PCS systems.^{6/}

The absence of PCS service and processing rules is not a technicality. Although the Commission's public notice suggests that parties will have an opportunity to petition to deny the pioneer's preference winners' applications once they are accepted for filing and placed on public notice, parties in fact will have no basis for determining how the applications should be measured against the standards and service criteria contained in the Commission's service rules. Until PCS rules and processing standards are finalized, it is

competitive bidding to award licenses for the use of radio spectrum, and stated its specific intention to use competitive bidding procedures for the award of narrowband and broadband PCS licenses. See Public Notice, FCC Adopts Rules to Implement Competitive Bidding to Award Spectrum Licenses (PP Docket No. 93-253) (Mar. 8, 1994). This order, however, which has not yet been released, does not appear to address the service-specific application or licensing procedures or the auction design that will be used for either broadband or narrowband PCS.

^{5/} Even APC has filed a petition for reconsideration seeking modifications to the technical rules which would influence the parameters of its PCS system.

^{6/} Bell Atlantic, for example, has challenged the FCC's uneven channelization plan as both technically and economically inefficient, and has proposed as an alternative a channel plan consisting of six 20 MHz blocks. While spectrum grants to the pioneers are currently for 30 MHz, revision of the PCS channel plan on reconsideration would change the size of the spectrum award, and would mean that applications based on the pioneer's preferences could not be processed without substantial revision. In addition, CTIA and the Utilities Telecommunications Council, among other parties, have challenged the Commission's decision to license PCS providers in service areas based on Rand McNally Major Trading Areas (MTAs), and even under the Commission's current mix of MTAs and BTAs, the decision to award the pioneer's preference winners gigantic MTA service areas will and should be revisited. Revision of the geographical scope of the preferences awarded to APC, Cox and Omnipoint would also require substantial revision of their license applications.

Mr. William F. Caton
March 16, 1994
Page 5

impossible for parties -- or the Commission for that matter^{2/} -- to evaluate particular applications or to file informed oppositions or comments on them.

Given the uncertainty still surrounding the processing and service rules for broadband PCS, it simply makes no sense to invite applications from pioneer's preference winners at this juncture. Modification of any of the service rules will require modification of PCS applications, and any corresponding filings in opposition to the applications will also necessarily require modification to follow the "moving targets" of the applications. Requiring applicants, Commission staff and objectors to expend time, labor and resources unnecessarily evaluating and commenting upon premature PCS applications is directly contrary to the Commission's attempt to adopt rules for PCS which will promote expeditious processing of applications while keeping application expenses to a minimum. See Auction Notice, 8 FCC Rcd at 7656-57.

2. No PCS Application May Be Accepted For Filing Because the Commission Has Not Complied With the Paperwork Reduction Act

Acceptance of any PCS applications for filing is barred not only by the absence of rules governing PCS and the processing of PCS applications, but also by the requirements of the Paperwork Reduction Act of 1980 ("PRA"). The PRA precludes federal agencies from collecting information unless the information request has been approved by the Office of Management and Budget ("OMB").

The PRA mandates that the Commission "shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request for collection of such information," it has (1) submitted the proposed information collection request, pertinent regulations and related materials to the Director of OMB and (2) obtained OMB approval of the proposed information collection request. 44 U.S.C. § 3507(a); see also 5 C.F.R. § 1320.4(a) (implementing regulations). Proposed rules that require the collection of information must be submitted to OMB for approval and assigned an OMB

^{2/} In making its public interest determination under Section 309(a) of the Communications Act, the Commission relies on the comments of interested parties to raise issues that should be evaluated in authorizing individual service licenses. Without final technical and service standards or processing rules, interested parties cannot meaningfully serve this function, and the Commission cannot properly acquire a factual basis for a licensing decision required by Section 308(b).

Mr. William F. Caton
March 16, 1994
Page 6

control number. See 5 C.F.R. §§ 1320.4, 1320.13. The Commission must also give Federal Register notice of OMB review. Id. at §§ 1320.13, 1320.15.

The application process for authorizations in a newly created service such as PCS -- as in all radio services -- clearly includes rules entailing "information collection requests" for financial and other qualification information to which the mandate of the PRA applies. See, e.g., Dana Communications, Ltd., 7 FCC Rcd 1878 (1992). In the Auction Notice, the Commission proposed to use existing Part 22 rules to govern the filing, processing and evaluation of applications for PCS authorizations. See 8 FCC Rcd at 7656, ¶ 128. Although these rules were previously approved by OMB in a different context, at no time does the Commission appear to have even sought let alone obtained OMB approval of the subject information collection requests for use in connection with the processing and evaluation of PCS applications.^{8/} In sum, the Commission cannot lawfully accept PCS applications because it does not have any effective OMB-approved rules by which to process and evaluate them. Inviting the application of any would-be PCS licensee must await OMB approval of the Commission's application, bidding and licensing rules for this new service.

3. Premature Acceptance and Processing of the "Pioneer" Applications Will Undermine the Broadband PCS Licensing Process and Prejudice Other PCS Applicants

Finally, Bell Atlantic strongly objects to the Commission's "invitation" to the broadband preference winners insofar as it presages the unlawful acceptance and grant of applications based upon the award of pioneer's preferences to APC, Cox and Omnipoint -- and possibly facilitates the buildout of their PCS systems -- long before other applicants are even permitted to apply and bid for PCS licenses. Under current Commission rules, APC, Cox and Omnipoint are entitled to have their applications processed free of competing applications, Third Report and Order at 4, ¶ 4. They are not entitled, however, to roll out their businesses with as much as a year or more's head start over other PCS competitors. While pioneer's preference winners may receive a "de facto" headstart over other licensees by virtue of the lag time that will attend the application for and receipt by other parties of PCS licenses, Report and Order, 6 FCC Rcd 3488, 3492 (1991), on recon., 7 FCC Rcd 1808 (1992), on further recon., 8 FCC Rcd 1659 (1993), there is no justification for the Commission to go much further and virtually guarantee a "temporary service monopoly."

^{8/} See Cellular Applications for Unserved Areas, 69 RR 2d 1277, 1298 (1991) and OMB Control No. 3060-0438 (OMB approval required for use of the firm financial commitment requirements contained in existing Section 22.917(c) in connection with applications for cellular unserved areas).

Mr. William F. Caton
March 16, 1994
Page 7

Id.^{9/} This is precisely what will occur if the Commission proceeds upon its present course and processes these applications well before application and processing rules or the auction framework for assigning PCS licenses have been implemented or finalized.^{10/}

More fundamentally, for the Commission to continue the processing of pioneer's preference winners' applications in the midst of such regulatory flux could make it equitably or politically difficult for the FCC to revise, for example, the geographic scope of the preference winners' licenses, the size of their spectrum allocations, or the economic terms under which the pioneer's preference winners obtain their licenses (i.e. whether or how much they should pay for them). Courts and the Commission have recognized that decisionmakers may be unconsciously influenced by the time, effort and resources expended by one party. See Community Broadcasting Co. v. FCC, 274 F.2d 753, 759 (D.C. Cir. 1960). It makes no sense to allow the pioneer's preference winners to be advantaged in the licensing and review process through reliance on systems that the Commission prematurely allows them to construct and operate. See Southern California Rapid Transit District, 67 RR 2d 328, 330 (1990) ("Experience teaches, however, that the very act of constructing and operating even a 'temporary' or 'experimental' facility often creates equities in its retention").^{11/}

^{9/} The premature processing of the pioneer preference winners' license applications signalled by the public notice would guarantee the "pioneers" a service monopoly on PCS for a significant period of time. This action is contrary to earlier Commission pronouncements declining to guarantee such a monopoly. See Report and Order, Gen. Docket 90-217, 6 FCC Rcd 3488, 3492 (1991). The Commission cannot reverse course on such policy choices without providing a thorough justification for doing so. See Rainbow Broadcasting Co. v. FCC, 949 F.2d 405, 408 (D.C. Cir. 1991); Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir.), cert. denied, 113 S.Ct. 57 (1992).

^{10/} Indeed, the Commission's processes here raise serious issues and potential violations of Congressional directives in the Omnibus Budget Reconciliation Act that competing providers of commercial mobile services be placed in competitive parity. It is difficult to imagine a regulatory scheme infected by less parity than one in which one competitor is given a headstart over all other competitors.

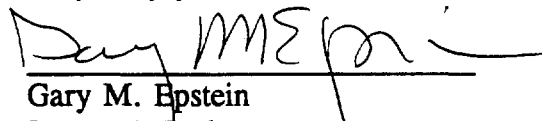
^{11/} Indeed, if licensing multiple, other PCS systems is more than a year in the future, then as technical issues arise in the interim, it may be difficult for the Commission to ignore operational standards set by APC, Cox and Omnipoint if they begin to expend capital to build out their proposed PCS systems. Cf. Air-Ground Telephone Service, 67 RR 2d 1329, 1344 (1990) ("An additional concern with the open-entry approach is that it arguably favors the operator of the experimental system").

Mr. William F. Caton
March 16, 1994
Page 8

* * * *

Any action that leads to the premature acceptance of "pioneer" license applications heightens the current, pervasive industry feeling that the pioneer's preferences for broadband PCS have been bestowed upon parties arbitrarily and not on the basis of the technical merit and significant innovation that the Commission's preference criteria require. The Commission's action in inviting PCS applications at this time was unlawful and unwise. Acceptance of any application at this stage of PCS licensing would exacerbate the illegality of that error. Such action is neither administratively advisable nor sustainable at a time when so many fundamental issues surrounding the PCS service rules, the PCS auctions and the pioneer's preference grants themselves remain unresolved. Bell Atlantic therefore formally requests that the Commission rescind the public notice inviting broadband PCS applications, return any such applications it has thus far received and take no further action to accept or process any PCS application until such time as the PCS service rules and application processing procedures have been clarified and finalized.

Very truly yours,



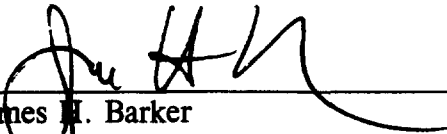
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March 16, 1994

cc: Commissioner Andrew C. Barrett
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All parties in Gen. Docket 90-314
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Certificate of Service

I, James H. Barker, certify that on this 16th day of March, 1994, I caused copies of the foregoing letter to William F. Caton to be served by first class mail, postage prepaid, on the parties on the attached service list.


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